INDEX

PETITION:	PAGE
Opinions Below	1
Jurisdiction	2
Question Presented for Review and Constitutional Provision Involved as to Appellant, William Kloiber	3
Question Presented for Review and Constitutional Provision Involved as to Appellant, Stephen F. Kloiber	3
Statement of the Case	3
Questions Relied on for the Allowance of the Writ	7
Argument as to Petitioner, William Kloiber	8
Argument as to Stephen F. Kloiber	13
Conclusion	16

APPENDIX:

Opinion of the Court of Quarter Sessions of Lehigh County, Pennsylvania	18
Order of the Trial Court Dismissing Motion for New Trial	27
Opinion of the Superior Court of Pennsylvania	27
Judgment of the Superior Court of Pennsylvania	32

PAGE

Opinion (Majority) of the Supreme Court of Pennsylvania 32

Judgment of the Supreme Court of Pennsylvania 45

Dissenting Opinion (Musmanno, Justice) 46

TABLE OF CASES CITED

Adamson v. People of State of California, 332 U. S. 46; 67 S. Ct. 1672 (1947) 10

Commonwealth v. Donough, 377 Pa. 46 9
Commonwealth v. Foley, 24 Pa. Super. Ct. 414 9
Commonwealth v. Green, 233 Pa. 291, 294 (1912) 9
Commonwealth v. Holley, 358 Pa. 296, 300, 301 9
Commonwealth v. Thomas, 275 Pa. 137, 141 9
Commonwealth v. Zukovaly, 324 Pa. 588 9

Harris v. State of South Carolina, 338 U. S. 68; 69 S. Ct. 1354 15

Palko v. Connecticut, 302 U. S. 319; 58 S. Ct. 149 13
People v. Adamson, 27 Cal. 2d 478; 165 P. 2d 3 10
People v. Taylor, 36 Cal. 522 10

Turner v. Commonwealth of Pennsylvania, 338 U. S. 62; 69 S. Ct. 1352 15

Watts v. State of Indiana, 338 U. S. 49; 69 S. Ct. 1357 .. 14
Wilson v. United States, 149 U. S. 60, 66; 138 S. Ct. 765 12

CONSTITUTIONS

Constitution of the United States, Amendment V, Section 5 ..... 2, 3

INDEX

PAGE

Constitution of the United States, Amendment XIV, Section 1 ..... 2, 3

Constitution of Pennsylvania, Article 1, Section 9 ..2, 3, 6, 8

STATUTES

Act of May 23, 1887, P. L. 158, Section 10 (Pennsylvania Statute) 8, 9, 10

TEXT BOOKS

8 Wigmore on Evidence 412 10

MISCELLANEOUS

Address by Justice Jackson before N. Y. State Bar Association, Jan. 30, 1954 16

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1954. No.

STEPHEN F. KLOIBER,
WILLIAM KLOIBER,
Petitioners,

VS.

COMMONWEALTH OF PENNSYLVANIA.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA.

Your petitioners, Stephen F. Kloiber and William Kloiber, respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Pennsylvania entered in the above entitled cases.

OPINIONS BELOW.

The opinion of the Trial Court, the Court of Quarter Sessions of Lehigh County, Pennsylvania is unreported. The opinion of the Superior Court of Pennsylvania is reported

in Volume 101 A. 2d 444; 174 Pa. Super. 483. Upon an allowance of appeal from the Superior Court of Pennsylvania to the Supreme Court of Pennsylvania an allocatur was allowed. The opinion of the Supreme Court of Pennsylvania is reported in 106 A. 2d 820. All opinions are appended to this petition.

JURISDICTION.

The jurisdiction of this Court is invoked under Amendment XIV, Section 1 of the Constitution of the United States of America, the "self-incrimination" clause of Amendment V, Section 5 of the Constitution of the United States of America and Article 1, Section 9 of the Constitution of Pennsylvania and the Act of May 23, 1887, P. L. 158, Section 10, Pennsylvania Statutes.

This is a criminal case in which the appellants were convicted on five counts of robbery. The appellants maintain that they were convicted in violation of the "due process" clause of Amendment XIV, Section 1 of the Constitution of the United States of America, in violation of their rights under Amendment V, Section 5 of the Constitution of the United States of America and in violation of their rights under Article 1, Section 9 of the Constitution of the State of Pennsylvania. The date of the judgment and sentence in the first instance, being the Court of Quarter Sessions of Lehigh County, Pennsylvania, was August 10th, 1953, on which date both appellants were sentenced by the Trial Court. On December 29th, 1953, the conviction of the appellants was affirmed by the Superior Court of Pennsylvania. On February 11th, 1954, the appellants prayed for an allowance of appeal from the affirmance of the judgment and sentence of the Superior Court of Pennsylvania and an

allocatur was allowed. On June 28th, 1954, the Supreme Court of Pennsylvania affirmed the judgments and sentences of the Trial Court.

QUESTION PRESENTED FOR REVIEW AND CONSTITUTIONAL PROVISION INVOLVED AS TO APPELLANT, WILLIAM KLOIBER.

1. Whether the Court, in placing admissions in the mouth of William Kloiber when he did not testify, violated the constitutional rights of the appellant as set forth under the "due process" clause of Amendment XIV, Section 1 of the Constitution of the United States of America, the "self-incrimination" clause of Amendment V, Section 5 of the Constitution of the United States of America, and Article 1, Section 9 of the Constitution of the State of Pennsylvania.

QUESTION PRESENTED FOR REVIEW AND CONSTITUTIONAL PROVISION INVOLVED AS TO APPELLANT, STEPHEN F. KLOIBER.

1. Whether the confession of the appellant, Stephen F. Kloiber, was admitted in violation of the "due process" clause of Amendment XIV, Section 1 of the Constitution of the United States of America.

STATEMENT OF THE CASE.

The appellants, Stephen F. Kloiber and William Kloiber, were convicted by a jury on five counts of robbery. At 12:35 P. M., February 29th, 1952 two men entered the R. & F.

Dress Company office in Allentown, Pennsylvania and at gun point took the payroll of Twenty-Five Hundred and Fifty-Six Dollars ($2556.00) from the bookkeeper and the president. Both men escaped in a waiting car driven by a third party.

The appellants and Michael Senkovich, the latter an escapee from the Bucks County, Pennsylvania jail, were subsequently arrested all within one month after the robbery, and charged with the offense.

Senkovich, after his arrest, gave a signed confession admitting his participation in the robbery, and in the confession implicated William Kloiber. Stephen F. Kloiber also gave a signed confession on March 21st, 1952. William Kloiber did not sign a confession.

In June of 1952 Senkovich entered a plea of guilty and was sentenced in the June Term, 1952 by the Trial Court.

William Kloiber and Stephen F. Kloiber entered pleas of not guilty and stood trial in January, 1953.

The bookkeeper and president, on two prior occasions before trial, failed to identify the Kloibers, but at the trial, were positive in this respect.

On March 20th, 1952 at 3:30 P. M., Stephen F. Kloiber, upon his arrest, was taken to the State Police Barracks in Lehigh County where he was held in a detention room until 9:30 P. M. when he was removed to a police station nearby and was kept overnight. Stephen F. Kloiber testified that he was expecting counsel at the barracks that evening. The next morning he was returned to the State Police Barracks and at 11:30 A. M. on March 21st, 1952, signed a confession. During all of this period of time, he complained of illness, of a desire to see his family, and mistreatment by police authorities. The appellant, Stephen F. Kloiber, testified that a short time before he signed his confession, while walking from one room in the barracks to an upstairs room, a State policeman who was behind him, grabbed and squeezed his testicles and insisted that he make a statement. He further testified that the police promised to permit him

to see his family if a written statement was given. The police denied generally the testimony of Stephen F. Kloiber as to mistreatment and promises made to him.

In the Lower Court, counsel for the Appellant, Stephen F. Kloiber, objected to the admission in evidence of the signed statement of the appellant, on the grounds that the statement was not given voluntarily. The Lower Court overruled the objection.

In the Superior Court, the question of the confession of Stephen F. Kloiber was raised by argument that it was obtained after two days of complete isolation. The question of the confession was also raised before the Supreme Court of Pennsylvania by setting forth the Court's refusal to charge on one of the points submitted by counsel for the appellant, in which point, coercion by the police authorities was charged, making the statement probably untrue, and not voluntarily made.

At no time was the "due process" clause of Amendment XIV of the Constitution of the United States of America invoked specifically. However, the appellants maintain that the objections made at the time of trial to the confession, and the arguments before the Appellate Courts of Pennsylvania, are so substantial as to require plenary consideration under the "due process" clause of Amendment XIV of the Constitution of the United States of America.

In the case of William Kloiber, the appellant who did not take the stand, the court, in its charge to the jury, made the following statement (Record, p. 20a):

> "However, I believe it is denied that Stephen Kloiber was at the Silver Star, but I think there is no doubt about William Kloiber having been at the Silver Star with Michael Senkovich on that morning."

Further, in the charge to the jury, the Trial Court made the following statement (Record, p. 30a):

> "I think there is no contradiction of William Kloiber

> having been at the farm and having gone with Michael Senkovich, at least the first time, to the Silver Star. So that William Kloiber does not make a denial that he was with Michael Senkovich on the early morning when this robbery occurred * * *"

The prosecuting attorney also made the statement to the jury that the appellants, prior to the time that this crime was committed, were harboring a fugitive from justice.

The Federal question sought to be reviewed was not raised in the Trial Court. However, after the charge of the Court, counsel for the appellants took a general exception to the charge, which was allowed and disposed of by the court en banc in affirming the verdict of the jury. The appellants believe that the errors in the Court's charge raise a question so substantial, as to require plenary consideration under Article 1, Section 9 of the Constitution of Pennsylvania; the "due process" clause under Amendment XIV to the Constitution of the United States of America and the "self-incrimination" clause of Amendment V of the Constitution of the United States of America.

The sentence of the Trial Court which was affirmed by the Superior Court of the State of Pennsylvania and the Supreme Court of Pennsylvania, made in the case of *Commonwealth vs. William Kloiber,* is as follows (Record, p. 62a):

> "Now, August 10th, 1953, the sentence of the Court is that you, William Kloiber, pay a fine of $100.00, the costs of prosecution, and undergo imprisonment in the Eastern State Penitentiary for a period of not less than three and one-half (3½) years nor more than seven (7) years and stand committed until this sentence is complied with."

The sentence of the Trial Court which was affirmed by the Superior and Supreme Courts of the State of Pennsyl-

vania, made in the case of *Commonwealth vs. Stephen F. Kloiber,* is as follows (Record, p. 61a):

> "Now, August 10th, 1953, the sentence of the Court is that you, Stephen F. Kloiber, pay a fine of $100.00, the costs of prosecution and undergo imprisonment in the Lehigh County Prison for a period of not less than three and one-half (3½) years nor more than seven (7) years and stand committed until this sentence is complied with."

QUESTIONS RELIED ON FOR ALLOWANCE OF THE WRIT.

1. Whether the Court Below violated the rights of Stephen F. Kloiber under Article 1, Section 9 of the Constitution of the State of Pennsylvania having to do with the rights of an accused in criminal prosecutions in connection with the involuntary manner in which the signed statement of Stephen F. Kloiber was given to the police authorities while he was in custody; and the due process clause under amendment XIV of the U. S. Constitution.

2. Whether the Court Below violated the rights of William Kloiber under Article 1, Section 9 of the Constitution of the State of Pennsylvania, the "due process" clause of Amendment XIV of the Constitution of the United States of America, and the section of Amendment V of the Constitution of the United States of America having to do with "self-incrimination."

ARGUMENT.

As to Petitioner William Kloiber.

Under Article 1, Section 9 of the Constitution of the State of Pennsylvania, a defendant cannot be compelled to give evidence against himself. Under the "General Evidence Act of 1887" (May 23, 1887, P. L. 158, Section 10), it was provided as follows:

> "Nor may the neglect or refusal of the Defendant actually on trial in a criminal court to offer himself as a witness be treated as creating any presumption against him; or be adversely referred to by court or counsel during the trial."

The opinion of the Supreme Court of Pennsylvania in this case states "to constitute error, the remark must go further, indicating a duty of the defendant to testify, and permitting an unfavorable inference to be drawn from his failure to do so." "We are convinced the Court intended no adverse reference, and that the jury drew no unfavorable conclusions, as a result of the portion of the charge here impugned." When the Lower Court stated to the jury that there was no doubt about the appellant, William Kloiber, having been at the Silver Star with Michael Senkovich on that morning (the date of the robbery) and then further stated in its charge "I think there is no contradiction of William Kloiber having been at the farm and having gone with Michael Senkovich, at least the first time, to the Silver Star. So that William Kloiber does not make a denial that he was with Michael Senkovich on the early morning when this robbery occurred", such comments were tantamount to statements coming from the mouth of William Kloiber who was never a witness in this case. It was a positive statement made by the Court and constituted error.

Under Pennsylvania law, adverse comment by the Court or counsel is forbidden where a defendant in a criminal case fails to offer himself as a witness.

Act of May 23, 1887, P. L. 158, Section 10;
Commonwealth v. Green (1912), 233 Pa. 291-294.

In *Commonwealth vs. Foley*, 24 Pa. Super. 414, a new trial was granted where the District Attorney remarked: "You have this woman here without a denial." The Court, in its opinion, stated that this privilege of the Defendant would be of little value if the fact that she claimed its protection (refused to offer herself as a witness) could be made the basis of an argument to establish her guilt.

Later cases decided by the Supreme Court of Pennsylvania have relaxed this rule to the extent that if the Court's charge, read as a whole is accurate and fair, and contains no basic or prejudicial error, it will be sustained even though isolated excerpts taken therefrom are or might be objectionable.

Commonwealth v. Donough, 377 Pa. 46;
Commonwealth v. Thomas, 275 Pa. 137, 141;
Commonwealth v. Holley, 358 Pa. 296, 300.

The Supreme Court of Pennsylvania in recent decisions upon this subject, has held that reference to the failure of a defendant to testify on his own behalf, to constitute reversible error, must call the Jury's attention to the fact that the Defendant has not testified and must reasonably lead to an inference that he would have taken the stand if not guilty.

Commonwealth v. Holley, 358 Pa. 296, 301;
Commonwealth v. Zukovaly, 324 Pa. 588, 591.

Against this now accepted rule of law in Pennsylvania, a few of our States, notably California, permit limited comment upon a Defendant's failure to testify. Under Section 1323 of the California Penal Code and the California Con-

stitution, Article 1, Section 13, both Court and counsel are authorized to comment on the failure of the accused to explain or deny any evidence against him and to be considered by the Court and the Jury.

People v. Adamson, 27 Cal. 2d 478, 165 P. 2d 3;
8 *Wigmore on Evidence* 412.

Prior to 1934, it was the rule in California that commenting on the Defendant's failure to take the stand or advising the Jury that it could draw inferences unfavorable to him on that account, violated the privilege against self-incrimination.

People v. Tylor, 36 Cal. 522.

The practical effect of the 1934 Amendment may be that many defendants who otherwise would not take the stand, will feel compelled to do so to avoid the adverse effects of the comments and consideration authorized by the Amendment. Such a coercive effect, however, is sanctioned by the Amendment which, being later in time, controls provisions adopted earlier.

People v. Adamson, 165 P. 2d 3, 9.

It must, therefore, be accepted that in criminal cases tried in Pennsylvania and California, the Trial Court and the prosecuting attorney may, by adverse comment, make the refusal of the defendant to take the stand, the basis of an argument to establish possible guilt. Under this reasoning, as concerns Article 1, Section 9 of the Pennsylvania Constitution and the Act of May 23, 1887, P. L. 158, Section 10, a defendant who exercises his constitutional privilege not to take the witness stand, may not now invoke the protection once afforded him.

In *Adamson v. People of State of California* (1947), 332 U. S. 46, 67 S. Ct. 1672, the appellant was convicted of murder. He did not take the stand. The provisions of California law, Constitution of California, Article 1, Section 13,

and the Penal Code of California, Section 1323, permit comment by the Court and by counsel upon the failures of the defendant to explain or deny evidence against him and to be considered by Court and jury. The Trial Court and the District Attorney argued the case in accordance with the constitutional and statutory provisions referred to above. The Court had for decision the question of their constitutionality under the limitations of Section 1 of Amendment XIV of the Constitution of the United States of America. Appellant urged that mention of prior convictions was error which further violated the provisions of the Fifth Amendment, that no person "shall be compelled in any criminal case to be a witness against himself". Defendant maintained that he had national privilege of immunity to be protected against State abridgment by the Fourteenth Amendment, or a privilege or immunity secured through the Fourteenth Amendment against deprivation by State action because it is a personal right, enumerated in the Federal Bill of Rights.

Mr. Justice Reed, delivering the opinion of the Court denying a rehearing, stated in part:

> "If facts, adverse to the Defendant, are proven by the prosecution, there may be no way to explain them favorably to the accused except by witnesses who may be vulnerable to impeachment or cross-examination. The Defendant must then decide whether or not to use such a witness. The fact that the witness may also be the Defendant makes the choice more difficult, but a denial of due process does not emerge from the circumstances."

Mr. Justice Murphy, with whom Mr. Justice Rutledge concurred in a dissenting opinion stated:

> "I agree that the specific guarantees of the Bill of Rights should be carried over intact into the first section of the Fourteenth Amendment."

This dissenting opinion further stated that where a Defendant does not take the stand, his silence is used as a basis for drawing unfavorable inferences against him as to matters which he might reasonably be expected to explain. Thus he is compelled, through his silence, to testify against himself.

Much can be said pro and con as to the desirability of allowing comment on the failure of the accused to testify. But policy arguments are to no avail in the face of a clear constitutional command. This guarantee of freedom from self-incrimination is grounded on a deep respect for those who might prefer to remain silent before their accusers.

As stated in *Wilson v. United States*, 149 U. S. 60, 66, 138 S. Ct. 765,

> "It is not everyone who can safely venture on the witness stand though entirely innocent of the charges against him. Excessive timidity, nervousness when facing others and attempting to explain transactions of a suspicious character, and often offenses charged against him, will often confuse and embarrass him to such a degree as to increase rather than remove prejudices against him."

Mr. Justice Black, dissenting, in which Mr. Justice Douglas concurs, states in part in *Adamson* case:

> "Conceding the possibility that this Court is now wise enough to improve on the Bill of Rights by substituting natural law concepts for the Bill of Rights, I think the possibility is entirely too speculative to agree to take that course. I would, therefore, hold in this case that the full protection of the Fifth Amendment's proscription against compelled testimony must be afforded by California. This I would do because of reliance upon the original purpose of the Fourteenth Amendment."

It has been decided that the Fifth Amendment is not directed to the States but solely to the Federal government. *Palko v. Connecticut*, 302 U. S. 319, 58 S. Ct. 149. That case also decided that in prosecutions by a State, the Fifth Amendment providing that no person shall be compelled in any criminal case to be a witness against himself, will fail, if the State elects to end the exemption.

It is to be noted that this Court does not now stand squarely upon the law as enumerated by Mr. Justice Cardozo in the *Palko* case decided in 1937. The rights of the citizen of the United States standing accused in a State criminal court, are slowly becoming more secure under the Bill of Rights, the Fourteenth Amendment and the Fifth Amendment after renewed consideration.

Adamson v. People of the State of California, supra, in which case, four Justices dissented where rehearing was denied.

ARGUMENT.

As to Stephen F. Kloiber.

As to the confession of Stephen F. Kloiber, this appellant urges that his confession was obtained under circumstances which made its use at the trial a denial of due process. When Stephen F. Kloiber was arrested on March 20th, 1952, he was taken to the State Police Barracks where he remained for six hours and was then removed to local police headquarters in the same County. He was promised that he could see his family if he would give a signed statement. At no time on March 20th or 21st was he permitted to see his family or counsel. The physical mistreatment by the police, coupled with his apparent illness, was not in accordance with due process. During this period he persistently

denied any knowledge of the robbery and was abused for his refusal to make a statement.

The Trial Judge overruled the appellant's objection to the use of the confession, but told the jury to disregard it if they found it to have been involuntary.

It must be further stated that the District Attorney had, in opening the case of the Commonwealth, made mention that this appellant had harbored a fugitive from a nearby prison, which statement, it is contended, was highly prejudicial to him. At the time of the appellant's arrest, the bookkeeper and president who were victims of the robbery, could not identify Stephen F. Kloiber, and later, at the preliminary hearing, neither victim identified the appellant. At the time of trial, the bookkeeper based her then positive identification on the "innocent look" upon the face of the accused.

While in custody, the appellant was not given the benefit of talking to counsel until he had given his signed statement.

In *Watts v. State of Indiana*, 338 U. S. 49, 69 S. Ct. 1357, the Court stated, in reversing the appellant's conviction,

> "A statement to be voluntary need not be volunteered. But if it is the product of sustained pressure by the police, it does not issue from full choice. When a suspect speaks because he is overborne, it is immaterial whether he has been subjected to a physical or mental ordeal. Eventual yielding to questioning under such circumstances is plainly the product of the suction process of interrogation and therefore the reverse of voluntary.
>
> To turn the detention of an accused into a process of wrenching from him evidence which could not be extorted in open court with all its safeguards, is so grave an abuse of the power of arrest as to offend the procedural standards of due process.
>
> The law will not suffer a prisoner to be made the deluded instrument of his own conviction."

Under our system, society carries the burden of proving its charge against the accused not out of his own mouth. It must establish its case, not by interrogation of the accused even under judicial safeguards, but by evidence independently secured through skillful investigation.

The appellant, Stephen F. Kloiber, maintains that neither prior to his arrest nor at the time of trial did the Commonwealth produce any evidence other than a belated identification by one victim whose description never matched this appellant both as to appearance or clothing. The Commonwealth used the confession of Senkovich who, at the trial of the appellants, when called as a witness for the Commonwealth, repudiated his statement and testified that the appellants were innocent.

This Court, in reversing the conviction in *Turner v. Commonwealth of Pennsylvania*, 338 U. S. 62, 69 S. Ct. 1352, under circumstances similar to those found in *Watts v. State of Indiana*, supra, stated that the petitioner was not permitted to see friends or relatives or counsel during the entire period of custody; that he was not informed of his right to remain silent until after he had been under the pressure of a long process of interrogation and had actually yielded to it.

In *Harris v. State of South Carolina*, 338 U. S. 68; 69 S. Ct. 1354, this Court reversed the conviction where the petitioner was denied counsel and access to family and friends. Evidence of excessive cruel treatment by the police was found as a fact.

Your appellants respectfully submit that their cases demand just consideration; that they have been denied due process of the law under the Fourteenth Amendment. The recent decisions of this Court also show a trend to granting relief to those tried in State criminal courts where the self-incrimination clause of the Fifth Amendment is invoked, although the Appellate Courts of the State have found no violation of the constitutional rights of persons so tried.

CONCLUSION.

In conclusion, the Appellants quote Associate Justice Robert A. Jackson in an address delivered January 30th, 1954, before the New York State Bar Association. In this address Justice Jackson stated:

> "The expanding authority of government, its encroachment on the fields once left to individual choice, can be compatible with individual liberty only if our officials are so much bound by law as our private citizens."

Justice Jackson further stated:

> "No individual should be subject to official condemnation, control or intrusion except at times and for reasons declared by law and applied to him by procedures which comport with our concept of due process of law."

The Appellants pray that their Petition for a Writ of Certiorari be granted by your Honorable Court.

Respectfully submitted,

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APPENDIX.

OPINIONS OF THE COURTS BELOW.

IN THE
SUPREME COURT OF PENNSYLVANIA.
EASTERN DISTRICT.

January Term, 1954. Nos. 163, 164.

COMMONWEALTH OF PENNSYLVANIA,
vs.
STEPHEN F. KLOIBER, *Appellant in No. 163,*
WILLIAM KLOIBER, *Appellant in No. 164.*

APPEALS FROM THE JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA AS OF JANUARY TERM, 1954, NOS. 163, 164, AFFIRMING THE JUDGMENT OF THE SUPERIOR COURT OF PENNSYLVANIA AS OF OCTOBER TERM, 1953, NOS. 278, 279, WHICH AFFIRMED THE JUDGMENTS AND SENTENCES OF THE COURT OF QUARTER SESSIONS OF THE COUNTY OF LEHIGH, AS OF APRIL SESSIONS, 1952, NOS. 67, 68.

OPINION OF COURT OF QUARTER SESSIONS OF LEHIGH COUNTY, PENNSYLVANIA.

JAMES F. HENNINGER, President Judge.

On February 29, 1952, the R. & F. Dress Company office was robbed of $2,556.67 by two men who took the money at gun point from the cashier and who escaped in a black automobile operated by a third man.

Michael James Senkovich confessed to being one of the robbers, pleaded guilty to the crime and so testified at the trial. Stephen F. Kloiber, one of the defendants, signed a statement before the Pennsylvania State Police in which he admitted that he was one of the two men participating in the robbery but he refused to name the third man. At the trial he repudiated his confession and offered an alibi.

The Commonwealth contended that defendant, William Kloiber, a brother of Stephen F. Kloiber, was the owner and driver of the escape car, but offered no eye witness to that fact. William Kloiber made no statement, and did not take the stand in his own behalf but offered an alibi.

In No. 67 April Sessions 1952 Stephen F. Kloiber was indicted in five counts for robbing while armed, simple robbery, assault with intent to rob, larceny and receiving of stolen goods. In No. 68 April Sessions 1952, William Kloiber was indicted in five counts for robbery with an accomplice, simple robbery, assault with intent to rob, larceny and receiving stolen goods.

When the cases were called for trial, counsel for Stephen F. Kloiber and William Kloiber moved for a separate trial, which motion was denied. At the end of Commonwealth's case, counsel for William Kloiber demurred to the evidence, which demurrer was overruled. Before the case was submitted to the jury, a point was presented and refused asking for a directed verdict of acquittal for both defendants.

Both defendants were found guilty on all five counts and

both have moved for a new trial, presenting five points in common and William Kloiber filed the additional point that his demurrer should have been sustained.

Both complain (1) that the verdict was against the law, the evidence, the weight of the evidence and the charge of the Court (2) refusal to direct a verdict of acquittal (3) refusal of points for charge (4) refusal to withdraw a juror, upon allegedly prejudicial remarks by the District Attorney and (5) refusal of motion for a separate trial.

In view of Stephen Kloiber's confession alone, to say nothing of the identification of him by the cashier and by her boss, certainly it cannot be said that the verdict against him is against the law, the evidence, the weight of the evidence or the charge of the Court and certainly there ought not to have been a directed verdict of acquittal.

There was no foundation laid for objection to any prejudicial remark by the District Attorney so that point cannot be considered. Commonwealth v. Kerr, 171 Pa. Super. 131, 133.

Besides the formal points for a directed verdict, the Court refused four of Stephen Kloiber's points for charge and four of William Kloiber's points for charge. In his brief and at argument, however, defense counsel stressed only two points, both applicable to the case of Stephen Kloiber alone.

We refused to charge as follows in the Stephen Kloiber case:

> "If you find the written statement of defendant was coerced in any way or is untruthful, then you must reject it entirely in your consideration of the case. Persons do not react the same way in identical situations. Where one is emotional, impulsive and quick to assert his rights, another may be timid and easily cowed, especially in the presence of the officers of the law. The rule as to considering any reasonable inference reflects only in the manner in which the average man is apt to conduct himself in such a circumstance. There are some people who, though guiltless of wrong-doing, have

a deep seated fear of policemen and processes of law so those are facts which you would take into consideration in determining whether you would believe that the statement of Stephen Kloiber was coerced in any way and consequently, untruthful and not voluntarily made."

Suffice it to say that the point was misleading and a mi statement of the law in calling for entire rejection of th statement if it was untruthful. Furthermore, there was n evidence to support its rejection on the basis of defendant emotional reactions. Stephen Kloiber's testimony if believe would have sustained its rejection on the basis of coercio and promises, but on no other ground. The jury rejecte that testimony, as they had the right to do.

It is a fundamental principle of the law that a judge ma accept or reject a point for charge as it is presented to hin He need not separate the wheat from the chaff and need no remold the point so that only the accurate statements of th law remain. Comm. v. Girardot, 107 Pa. Super. 274, 27

The same principle applies to the Court's rejection of de fendant's point for charge concerning identity which, a defense counsel concedes, contains statements properly re fused.

In both instances an accurate statement of the law cover ing confessions and identity—although not in the languag chosen by defendants—was incorporated in the charge itsel

Defendants' arguments against a joint trial are based o these alleged prejudicial disadvantages (1) Stephen an William Kloiber are charged with different crimes in th first count of their several indictments; (2) the testimon against William Kloiber was circumstantial only, while th case against Stephen consisted of a confession and identif cation by eye witnesses.

Joint trial of several defendants separately indicted fo participation in a joint crime or related crimes is a matte within the sound discretion of the trial judge. Comm. v

Mulroy, 154 Pa. Super. 410, 413. Nevertheless, since by necessity the trial judge has become, by stipulation of counsel, the Court en banc, we review that discretion.

Both defendants were charged with participation in the very same robbery, as the result of a previously laid plan. While the District Attorney chose to emphasize "armed robbery" in the first count of the Stephen Kloiber indictment and "robbery with accomplices" in that of William Kloiber, both could have been properly charged with violation of both clauses of Section 705 of the Criminal Code of 1939, P. L. 872, 18 P. S. 4705.

All of the Commonwealth's testimony excepting perhaps the statement of Stephen Kloiber, was referrable to both defendants either in proof of the commission of the crime, the presence of a third person, confrontation of defendants by an admitted participant and conspiracy. The confession of Stephen Kloiber did not name William Kloiber and could not have been harmful to him.

In Commonwealth v. McCord, 116 Pa. Super. 480, two defendants, separately indicted for driving while intoxicated, involuntary manslaughter and assault were jointly tried and the Superior Court held that joint trial was proper. While the Court held (p. 486) that such joint trial was proper for *misdemeanors* growing out of the same matters and circumstances so related that the proofs received in one would be competent in the other, it is pointed out in Comm. v. Mulroy, supra (p. 414), that the rule applied as well to felonies (other than felonious homicide) as to misdemeanors.

In Comm. v. Mulroy, supra, three defendants were jointly tried because all of the charges arose out of operation of the same house of prostitution although all were not charged with the same crimes, for instance, one with pandering, one with operating a disorderly house and one with prostitution.

In Comm. v. Danaleczk, 85 Pa. Super. 253, three defendants were jointly tried and the joint trial sustained al-

though two were convicted of rape committed upon one woman and two others on another.

In Comm. v. Wiener and Zvon, 148 Pa. Super. 577, three defendants were jointly tried on separate indictments for violations of the election laws and the joint trial was sustained because the evidence showed conspiracy or "corrupt agreement" (p. 583), although the defendants may not all have committed the same wrongful acts.

Certainly there are cases like Comm. v. Dauphinee, 121 Pa. Super. 565, 589, and Comm. v. Schmidheiser, 111 Pa. Super. 283, in which the Court held that compulsory joint trial was improper, but in those cases the indictments charged unrelated crimes in which there was no joint participation. That is not the case here.

The last point raised in the reasons advanced for a new trial is that the testimony against William Kloiber was purely circumstantial, which is correct, and that the circumstances were not such as to justify submission of the case to a jury, with which we do not agree.

Defense counsel concedes that the Court in its charge laid down the proper rule for conviction on circumstantial evidence as follows:

> "In order to warrant a conviction on circumstantial evidence, the facts and circumstances proved must be of such a character as to produce a moral certainty of the guilt of the accused beyond a reasonable doubt, not that they need be absolutely incompatible with his innocence."

There was credible and competent testimony that William Kloiber interested himself in Michael Senkovich, one of the robbers, that he found a hide-out for him at his brother's farm, that he came there frequently and held whispered conversations with Stephen Kloiber and Michael Senkovich, that on February 29, 1952, the day of the robbery, he helped remove Michael Senkovich and Rose Trexler from the Stephen Kloiber farm to the Silver Star Hotel, that William

Kloiber told Michael Senkovich that he would see him later, that at 11:30 A. M. on the same day William Kloiber's black sedan pulled up to the Silver Star, that William Kloiber got out and approached the hotel, but that Senkovich left the hotel before William Kloiber got to the door, that at 6:30 to 7:00 P. M. of the same day William Kloiber came to the Silver Star and gave Senkovich his car keys saying "I'm through with your car," that at State Police Headquarters Senkovich in the presence of William Kloiber was asked if Kloiber was one of the men with him on a robbery on February 29, 1952 and replied in the affirmative, whereupon William Kloiber's rejoinder was "I'm not worrying about it." There was testimony that Michael Senkovich and Stephen Kloiber perpetrated the R. & F. Dress Factory robbery on February 29, 1952, and that a third man was sitting in the get-away car, a black sedan. The loot from the robbery was divided in three ways at the Stephen Kloiber farm.

It is true that much of this testimony was contradicted and the credibility of some of the witnesses was attacked, but the jury had the right to accept and to act upon the testimony it found credible.

Under the circumstances recited, a jury would have no trouble having a moral certainty concerning William Kloiber's guilt. All of the circumstances were consistent with and pointed to William Kloiber's guilt and none were inconsistent with his guilt.

Since the jury had the right to convict under the circumstances, the verdict of guilt as to William Kloiber was not against the law, the evidence, the weight of the evidence or the charge of the Court.

Besides the reasons given for a new trial, defense counsel presented two points at argument which we are bound to consider because he contends that they constitute fundamental error in the charge.

The first of these points (No. II in Defense Brief), objects to our assuming that certain facts in the case had not been denied and therefore could be accepted by the jury. It is a

problem frequently arising when the defense is an absolute denial coupled with an alibi.

The first accepted fact was that there was a robbery by two men and that there was a third man waiting in a black automobile. The defense did not cross-examine one of the Commonwealth's witnesses (Althea Block) who so testified, and despite a searching cross-examination of Virginia Williams on the point of identification left unchallenged her testimony that the two robbers got away in a black sedan. The statement was made in a recital dealing with the definition of the crimes charged and was not with relation to any particular defendant.

The second fact was that William Kloiber was at the Silver Star on the morning of the robbery. Testimony elicited by defense counsel himself from the wife of William Kloiber and her mother was that he was absent from his home at the time he was to have taken Senkovich to the Silver Star to register, the proprietor so testified, Stephen Kloiber on direct examination by counsel for himself and for William Kloiber testified, "So my brother took Senkovich to the Silver Star." Furthermore, William Kloiber's counsel, himself, asked Senkovich this question, "And after Bill Kloiber left the Silver Star Hotel sometime after 8:30 or 9 o'clock, or 10 o'clock, on the morning of February 29th, 1952, he did not return to pick you up for any holdup later, did he." Under such circumstances it is not surprising that the fact should be considered uncontroverted and, in any event, the words preceding the statement of fact "I think there is no doubt" are clearly a permissible statement of the Court's opinion and not a direction to the jury so to find.

The case of Commonwealth v. Chambers, 367 Pa. 159, does not sustain defendants' position. In that case the Court made an absolute statement on a *controverted* fact. In this case the facts assumed were not controverted and the Court merely expressed its opinion. The same case recognizes the duties and privileges of a judge (p. 164):

"While the main purpose of a judge is to state and explain the law and briefly review the evidence, it is always the privilege and sometimes the duty of a trial judge to express his own opinion, including his opinion of the weight and effect of the evidence or its points of strength and weakness or even the guilt or innocence of the defendant and the verdict which, in his judgment, the jury should render, provided (1) there is reasonable ground for any statement he may make; and (2) he clearly leaves to the jury the right to decide all the facts and every question involved in the case, regardless of any opinion of the court thereof."

The Court clearly left defendants "guilt or innocence" to the jury as well as the credibility and weight of the testimony.

The other point (No. III in Defense Brief) is that the Court failed to adequately define the basis on which statements of Senkovich were received into evidence.

It must be remembered that Senkovich pleaded guilty, that he had given a signed confession implicating both Kloibers and that on the witness stand he recited the facts of the robbery and division of the spoils fairly accurately, but insisted that his two accomplices were men by the name of Kelly and Crawford, clearly a fabrication to anyone who heard him testify. The District Attorney properly pleaded surprise and was permitted to cross-examine Senkovich, who admitted having implicated the Kloibers but claimed to have done so under coercion and out of revenge because, as he said, they ordered him out of their house.

Certainly the District Attorney could not allow the surprise testimony to go unchallenged, leaving uncontradicted Senkovich's statement that his accomplices were Kelly and Crawford. The best he could do was to cancel out that part of the testimony which was false leaving the part that was true. What more could have been added to our cautionary charge which was in the following language:

"The District Attorney then was given the privilege of cross-examining him, and he then testified that he had named two other men. I want to say to you that the effect of that testimony would not be to produce testimony because Michael Senkovich did not say in our Court here, that William and Stephen Kloiber were the persons who were with him, it would not amount to the production of testimony that they were the men. If you believe from that cross-examination that Michael Senkovich was lying when he said it was Kelly and Crawford, it would simply serve to blot out his testimony that the men who were with him was a man by the name of Kelly and a man by the name of Crawford, but it would not produce positive testimony as to who those two men were."

Defense counsel suggests that we should have added that if Senkovich was lying in part, he could be lying about everything. We made that point generally concerning all witnesses at another point in the charge.

The right to offer evidence to show that a witness has made prior statements inconsistent with his present testimony in order to attack credibility has always been sustained. Comm. v. Disalvo, 275 Pa. 70, 75; Comm. v. Woods, 366 Pa. 618, 622; Comm. v. Rothman, 166 Pa. Super. 163, 165.

The case of Comm. v. White, 340 Pa. 139, cited by defense counsel is not in point. In that case an effort was made to introduce evidence of prior statements by the witness *in support of* his testimony. This case, of course, is entirely different, since it involves contradictory statements on fundamental issues.

We believe defendants received a fair trial with an adequate and fair charge of the Court and that their conviction was amply justified.

ORDER OF TRIAL COURT DISMISSING MOTION FOR NEW TRIAL.

NOW, July 20, 1953, defendants' motions for a new trial are denied, their convictions are sustained and they are ordered to appear in Court for sentence on Monday, August 10, 1953 at 9:30 o'clock A. M., Eastern Daylight Saving Time.

By the Court:

JAMES F. HENNINGER,
P. J.

OPINION OF THE SUPERIOR COURT OF PENNSYLVANIA.

(Reported, 174 Pa. Super. Ct., 483; 101 A. 2d 444.)

Before RHODES, P. J., and HIRT, RENO, ROSS, GUNTHER, WRIGHT and WOODSIDE, JJ.

WOODSIDE, Judge.

The appellants in these cases were convicted by a jury of robbery. The evidence showed that at 12:35 P. M. February 29, 1952, two men entered the R. & F. Dress Company Office in Allentown, and at gun point took the payroll of $2,556.67 from the bookkeeper and the president. The two escaped in a waiting car driven by a third party.

The defendants, together with one Michael Senkovich, an escapee from the Bucks County Jail, were subsequently arrested and charged with the offense. Michael Senkovich and the defendant, Stephen Kloiber, were alleged to have been the two armed men who entered the premises; the

defendant, William Kloiber, was alleged to have been the driver of the car used in the crime.

Senkovich and Stephen Kloiber, upon apprehension, gave signed statements to the Pennsylvania State Police, admitting participation in the robbery. Both were identified at the trial by the company bookkeeper and the company president as the two men who had entered the office and seized the payroll, although on two previous occasions these witnesses had failed to identify them as the holdup men. Senkovich entered a plea of guilty and was sentenced by the Court. Subsequently the appellants entered pleas of not guilty, and their cases were consolidated and tried jointly by a jury before Judge James F. Henninger. A verdict of guilty was found as to both defendants on all counts. Both filed motions for a new trial. Following argument thereon, the motions were dismissed by the lower court and sentences were imposed. These are appeals from the judgments and sentences.

[1, 2] Appellants object to the failure of the lower court to grant their request for separate trials. The propriety of consolidating indictments for trial is a matter for the trial court to determine in the exercise of a sound discretion, and the appellate courts will not reverse except for a clear abuse of such discretion. Commonwealth v. Mulroy, 1943, 154 Pa. Super. 410, 412, 36 A. 2d 337, and cases cited therein. Here, both defendants were charged with participation in the same crime and almost all of the evidence introduced was applicable to both. We can find no abuse of discretion here and we accordingly are of the opinion that the indictments were properly tried together.

[3] Five counts were contained in Stephen Kloiber's indictment, the first of which was armed robbery, he being charged with being one of the two men who entered the building and committed the armed robbery. Five counts were also contained in William Kloiber's indictment, the

first of which was robbery with accomplice, he being charged with waiting outside in the car to assist his accomplices in their escape. The other four counts were identical. The court in its charge to the jury made reference to the counts against both defendants being "parallel." Although the trial judge asked at the end of his charge whether either counsel had anything further to be brought to the attention of the jury the court's attention was not called to this matter. We think the reference in the charge to the counts being parallel was harmless error under the circumstances of the case.

William Kloiber did not take the stand. In reviewing the testimony the court said in its charge, "I think there is no contradiction of William Kloiber having been at the farm and having gone with Michael Senkovich, at least the first time, to the Silver Star. So that William Kloiber does not make a denial that he was with Michael Senkovich on the early morning when the robbery occurred, but now Rose Trexler says that William Kloiber drove up to the Silver Star," etc.

It is to be noted that the court is not talking about the time of the robbery but of an earlier hour. Nevertheless, standing alone the statement "that William Kloiber does not make a denial that he was with Michael Senkovich" could be considered reversible error. Commonwealth v. Green, 1912, 233 Pa. 291, 82 A. 250; Commonwealth v. Foley, 1904, 24 Pa. Super. 414; Commonwealth v. Thomas, 1922, 275 Pa. 137, 118 A. 667. But we must consider the charge as a whole. Commonwealth v. Barnak, 1947, 357 Pa. 391, at page 406, 54 A. 2d 865, and cases cited therein.

The Court finished its charge as follows:

> "There is one more thing to be said to you, and that is that any person accused of crime has a constitutional right not to testify. They have a right not to take the stand if they see fit to do so, and I want to impress on you that the fact that a person has chosen to exercise that constitutional right does not give you the power to

draw any unfair or adverse inference concerning that person. To put it specifically, William Kloiber chose not to testify in this case. That was his constitutional privilege, and the fact that he exercised that right does not give you the right to draw any inference that could be adverse to him in this case."

[4] Considering the charge as a whole we think the jury clearly understood that they could draw no inference adverse to the defendant from his failure to take the stand and that his failure to deny that he was with Senkovich early in the morning of the day of the alleged robbery could not be taken as an admission by him that they were together that morning. See Commonwealth v. Holley, 1948, 358 Pa. 296, 56 A. 2d 546.

[5] The trial judge expressed his opinion on some of the evidence and this he may do even to the point of indicating an opinion, so long as the jury is left free, as this one was, to act upon its own view of the evidence. Commonwealth v. Elliot, 1928, 292 Pa. 16, 21, 140 A. 537; Commonwealth v. Webb, 1916, 252 Pa. 187, 197, 97 A. 189; Commonwealth v. Lessner, 1922, 274 Pa. 108, 114, 118 A. 24; Commonwealth v. Foster, 1950, 364 Pa. 288, 293, 72 A. 2d 279; Commonwealth v. Simmons, 1949, 361 Pa. 391, 65 A. 2d 353.

[6] In commenting on the evidence of identification the Court pointed out that the witnesses had twice before failed to identify Stephen Kloiber and that on one occasion they were under oath. He then said: "You must also bear in mind that when we come to the question of identification, that there can be mistakes made insofar as identification testimony is concerned, and you must accept such testimony with caution." Appellants wanted more said about the caution with which identification testimony was to be received, but the charge of the court was sufficient on this point.

At the trial Michael Senkovich admitted participating in

the robbery with two other men, but said they were not the defendants. Having previously signed a confession involving the defendants as his accomplices, the District Attorney pleaded surprise and cross-examined him on this point. Concerning this testimony the Court commented as follows:

> "I want to say to you that the effect of that testimony would not be to produce testimony because Michael Senkovich did not say in court here that William and Stephen Kloiber were the persons that were with him, it would not amount to the production of testimony that they were the men. If you believe from that cross-examination that Michael Senkovich was lying when he said it was Kelly and Crawford, it would simply serve to blot out his testimony that the men who were with him was a man by the name of Kelly and a man by the name of Crawford, but it would not produce positive testimony as to who those two men were."

[7] There is no merit to the appellants' complaint that the effect of the testimony relating to the confession was not properly explained to the jury.

We have read carefully the entire charge and are convinced that it was fair to both defendants and that their objections to it are without merit.

[8] Although the evidence against Stephen is stronger than that against William, there was sufficient evidence to warrant the latter's conviction. We see no necessity to relate here in detail the evidence from which the jury could properly infer his guilt.

JUDGMENT OF SUPERIOR COURT OF PENNSYLVANIA.

The judgments are affirmed; and it is ordered that the defendants appear in the court below at such time as they may be there called, and that they be by that court committed until they have complied with their sentence or any part of it that had not been performed at the time the appeal was made a supersedeas.

OPINIONS OF THE SUPREME COURT OF PENNSYLVANIA.

(Not yet reported in the Pennsylvania State reports, but reported 106 A. 2d 820.)

Before STERN, C. J., and STEARNE, JONES, BELL, CHIDSEY, MUSMANNO and ARNOLD, JJ.

BELL, Justice.

Two armed men entered the office of the R. & F. Dress Company at 1214 Gordon Street, Allentown, Pa., at approximately 12:35 o'clock p. m. on February 29, 1952, held up the company's bookkeeper and president, seized the cash payroll, and escaped in a black sedan car which was waiting for them and was being driven by a third person.

Senkovich and defendant, Stephen Kloiber, were alleged to have been the two armed robbers and William Kloiber the driver of the getaway car. Senkovich and Stephen Kloiber, after being arrested, gave signed confessions to the Pennsylvania state police admitting their participation in

the robbery; and Senkovich also implicated William Kloiber as the driver of the getaway car. Senkovich pleaded guilty and was sentenced by the Court.

Stephen Kloiber and William Kloiber were separately indicted but were tried together. At the trial of this case the president and the bookkeeper who were held up, positively identified Stephen Kloiber as one of the two robbers, although they had failed to do so on two previous occasions. William Kloiber did not make any confession or take the witness stand. Senkovich at the trial of these defendants repudiated his written confession and testified he was with two other men named Kelly and John Crawford.

Stephen and William were convicted and from the judgment and sentence of the Court of Quarter Sessions they appealed to the Superior Court. Their conviction was sustained by the Superior Court, 174 Pa. Super. 483, 101 A. 2d 444 and this Court allowed an allocatur.

Defendants allege numerous errors in their trial, several of which we shall discuss.

Defendants' first complaint is that the Court erred in refusing their request for separate trials. Stephen Kloiber and William Kloiber were each separately indicted on five counts. The first count against Stephen was one of armed robbery; the first count against William was one of robbery with accomplice; the other four counts, charging robbery, assault with intent to rob, larceny and receiving stolen goods, were identical. Both men were charged with participating in the same robbery and the same crimes at the same time, and not with participating in separate and distinct offenses. The Commonwealth called 14 witnesses in its case in chief and with several exceptions, the testimony of all witnesses was material and relevant as to both defendants.

[1-3] The trial Judge because of his position and for other obvious reasons has been given a discretion to determine whether a number of bills of indictment should be consolidated and tried together, and his exercise of discretion in

such matters will not be reversed by an appellate Court unless there has been a manifest abuse of discretion or a joint trial is so unfair as to be clearly unjust and prejudicial to one or more of the defendants. Especially is a joint trial permissible, if not advisable, when the crimes charged grew out of the same acts and much of the same evidence is necessary or applicable to both defendants. Com. v. Mulroy, 154 Pa. Super. 410, 36 A. 2d 337; Com. v. Valotta, 279 Pa. 84, 123 A. 681; Com. v. Quinn, 144 Pa. Super. 400, 405, 19 A. 2d 526.

There was no manifest abuse of discretion or prejudicial error in trying these two defendants together on all of the aforesaid indictments.

Defendants also allege a number of errors in the charge and in the rulings of the Court. The first error alleged is that the Court erred in the following portions of its charge: "* * * it is admitted in this case that at least two people took part who were in the dress goods plant, and then there is no contradiction that there was a third party who was in an automobile. * * * I think there is no doubt about William Kloiber having been at the Silver Star Hotel with Michael Senkovich that morning." That Court subsequently left to the jury the determination of all the facts and said it was their recollection and their opinion of the evidence which prevailed; and they had the right to decide all the facts and questions involved in the case.

[4] There is no reversible error in these excerpts from the charge, since there was ample evidence and reasonable ground for the Court's statements and they did not constitute, as defendants contend, statements of fact within the principle of Commonwealth v. Chambers, 367 Pa. 159, 79 A. 2d 201. In that case the Court said in 367 Pa. at page 164, 79 A. 2d at page 204: "It is the exclusive province of the jury, not the court, to decide all the facts, the inferences therefrom, the credibility of the witnesses and the weight and effect to be given to all of the testimony. While the main purpose

of a judge is to state and explain the law and briefly review the evidence, it is always the privilege and sometimes the duty of a trial judge to express his own opinion, including his opinion of the weight and effect of the evidence or its points of strength and weakness or even the guilt or innocence of the defendant and the verdict which, in his judgment, the jury should render, provided (1) there is reasonable ground for any statement he may make; and (2) he clearly leaves to the jury the right to decide all the facts and every question involved in the case, regardless of any opinion of the court thereon. Commonwealth v. Cunningham, 232 Pa. 609, 611, 81 A. 711; Commonwealth v. Foster, 364 Pa. 288, 293, 72 A. 2d 279; Commonwealth v. Simmons, 361 Pa. 391, 407, 65 A. 2d 353; Commonwealth v. Watts, 358 Pa. 92, 97, 56 A. 2d 81; Commonwealth v. Jones, 341 Pa. 541, 551, 19 A. 2d 389; Commonwealth v. Nafus, 303 Pa. 418, 420-421, 154 A. 485."

We come now to the following excerpt from the Court's charge: "I think there is no contradiction of William Kloiber having been at the farm and having gone with Michael Senkovich at least the first time to the Silver Star. So that *William Kloiber does not make a denial*[1] that he was with Michael Senkovich on the early morning when this robbery occurred * * *." There was ample testimony to prove that William Kloiber was at the farm and at the Silver Star with Senkovich at the times in question; but the question remains whether this constituted an adverse comment by the Court on the defendant's failure to testify in violation of §10 of the Act of 1887, 19 P. S. §631.

William Kloiber pleaded "not guilty" and did not take the witness stand. After correctly telling the jury that it is their understanding and recollection of the testimony which governs and prevails, and that they are the persons to determine its weight and credibility, the Court said: "There is one more thing to be said to you, and that is that any

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[1] Italics throughout, ours.

person accused of crime has a constitutional right not to testify. They have a right not to take the stand if they see fit to do so, and I want to impress on you that the fact that a person has chosen to exercise that constitutional right does not give you the power to draw any unfair or adverse inference concerning that person. To put it specifically, William Kloiber chose not to testify in this case. That was his constitutional privilege, and the fact that he exercised that right does not give you the right to draw any inference that could be adverse to him in this case." That was certainly a very fair and proper statement of the law.

[5] If the Court's charge read as a whole is accurate and fair and contains no basic or prejudicial error, it will be sustained even though isolated excerpts taken therefrom are or might be objectionable. Commonwealth v. Donough, 377 Pa. 46, 53, 103 A. 2d 694; Commonwealth v. Barnak, 357 Pa. 391, 406, 54 A. 2d 865; Commonwealth v. Patskin, 372 Pa. 402, 422, 93 A. 2d 704. The statement of the trial Judge that William Kloiber does not make a denial that he was with Senkovich on the early morning when this robbery occurred, (but at an earlier hour) does not under our prior decisions constitute reversible error. Commonwealth v. Thomas, 275 Pa. 137, 141, 118 A. 667; Commonwealth v. Holley, 358 Pa. 296, 300, 301, 56 A. 2d 546; Commonwealth v. Schuster, 158 Pa. Super. 164, 168, 169, 44 A. 2d 303; Commonwealth v. Nelson, 294 Pa. 544, 144 A. 542; Commonwealth v. Chickerella, 251 Pa. 160, 96 A. 129. Cf. however, Commonwealth v. Green, 233 Pa. 291, 82 A. 250; Commonwealth v. Foley, 24 Pa. Super. 414.

In Commonwealth v. Thomas, 275 Pa. at pages 140, 141, 118 A. at page 668, supra, the Court approved the charge of the trial Judge in a first-degree murder case and said: "'* * * The *defendant has not seen fit to produce any evidence* in answer to the charge of the commonwealth and in answer to the evidence produced by the commonwealth. It is the law, and I so charge you, that the fact that the de-

fendant does not go on the stand, or does not produce any evidence in his own behalf, is not to be taken and considered as any evidence of guilt, or to be taken and considered as anything against him whatsoever. * * *'

"* * * When the general evidence act of 1887 (May 23, 1887 P. L. 158, sec. 10 [19 P. S. §681, et seq.]) was passed the earlier statutes mentioned were repealed, and an important modification of this direction was made. It was then provided, and the act is now in force: 'Nor may the neglect or refusal of the defendant actually on trial in a criminal court to offer himself as a witness be treated as creating any presumption against him, or be adversely referred to by court or counsel during the trial.' It is to be noted that *no longer does the mere mention of the defendant's failure to take advantage of his right to be heard constitute error* (Com. v. Brown, 16 Wkly. Notes Cas. 557), but to justify reversal the reference thereto must be 'adverse'.

"So, a statement that *the evidence of the commonwealth is uncontradicted* is harmless. Com. v. Chickerella, 251 Pa. 160, 96 A. 129; Com. v. Martin, 34 Pa. Super. 451; Com. v. Rizzo, 78 Pa. Super. 163. To constitute error, the remark must go further, indicating a duty of the defendant to testify. and permitting an unfavorable inference to be drawn from his failure to do so. Com. v. Green, 233 Pa. 291, 82 A. 250; Com. v. Foley, 24 Pa. Super. 414. * * *"

In Commonwealth v. Chickerella, 251 Pa. 160, 96 A. supra, the defendant's conviction of murder in the first degree with the penalty of death was sustained even though the Court charged the jury: " 'There has been no dispute as to the facts; that is to say, the *defense has not made any denial* of the testimony as offered by the commonwealth.' "

In Commonwealth v. Schuster, 158 Pa. Super. 164, at pages 168-169, 44 A. 2d 303, 306 the Court said: " '* * * Only Vincent J. Schuster, the defendant, is charged in this indictment, and Vincent J. Schuster *did not appear as a wit-*

ness in his own behalf.' The statute does not prohibit a mere reference to the fact that a defendant has not taken the witness stand, Com. v. Nelson, 294 Pa. 544, 144 A. 542; Com. v. Yollin, 115 Pa. Super. 215, 175 A. 429; the prohibition is against adverse comments on the part of the court or prosecutor. Com. v. Chickerella, 251 Pa. 160, 96 A. 129; Com. v. Martin, 34 Pa. Super. 451. 'To constitute error, the remark must go further, indicating a duty of the defendant to testify, and permitting an unfavorable inference to be drawn from his failure to do so. Com. v. Green, 233 Pa. 291, 82 A. 250; Com. v. Foley, 24 Pa. Super. 414'; Com. v. Thomas, 275 Pa. 137, 141, 118 A. 667, 669. We are convinced the court intended no adverse reference, and that the jury drew no unfavorable conclusions, as a result of the portion of the charge here impugned."

In Commonwealth v. Nelson, 294 Pa. 544, 144 A. 542, 544, supra, Mattie Nelson, indicted for murder, was convicted of manslaughter. The Court held the following portion of the charge did not transgress the rule: " 'Frank Day is dead. He is not here to tell his story. She is alive; she is here on trial.' "

[6] In Commonwealth v. Holley, 358 Pa. 296, 56 A. 2d 546, supra, a conviction of murder in the first degree with penalty of death was affirmed, even though the trial Judge pointed out that the defendant's version of the killing was not given from the witness stand. This Court said, 358 Pa. at pages 300, 301, 56 A. 2d at page 548: "Appellant's contention that the court below commented adversely on the fact that the appellant failed to testify on his own behalf, contrary to the Act of May 23, 1887, P. L. 158, 19 P. S. §631, is untenable. * * * Reference to the failure of a defendant to testify on his own behalf, to constitute reversible error, must call the jury's attention to the fact that the defendant has not testified and must reasonably lead to an inference that he would have taken the stand if not guilty. Cf. Commonwealth v. Zukovsky, 324 Pa. 588, 591, 188 A. 349; Commonwealth v. Thomas, 275 Pa. 137, 118 A. 667; Commonwealth v. Foley, 24 Pa. Super. 414. Appellant's rights were adequately protected by the trial judge when he said: 'He does not have to take the stand to testify on his own behalf if he does not want to, and the fact that he does not is not to be taken as an admission of guilt of any particular degree of crime.' "

[7] In the light of these authorities we find no reversible error in the charge of the Court on this point. We are convinced that the trial Judge did not, intentionally or otherwise, refer adversely to defendant's failure to testify and that the jury would not have been warranted in drawing an adverse inference from this charge. However, we cannot refrain from cautioning the lower Courts against any statement or charge, either in its entirety or in isolated portions, which permits a jury to draw an unfavorable inference against a defendant from his failure to testify.

Defendants allege reversible error in the Court's refusal of the following point for charge:

"8. If you find the written statement of Defendant was coerced in any way or is untruthful, then you must reject it entirely in your consideration of the case. Persons do not react the same way in identical situations. Where one is emotional, impulsive and quick to assert his rights, another may be timid and easily cowed, especially in the presence of the officers of the law. The rule as to considering any reasonable inference reflects only in the manner in which the average man is apt to conduct himself in such a circumstance. There are some people who, though guiltless of wrong-doing, have a deep seated fear of policemen and processes of law, so those are facts which you would take into consideration in determining whether you would believe that the statement of Stephen Kloiber was coerced in any way, and consequently, untruthful and not voluntarily made. Refused."

[8, 9] The Court's charge to the jury was adequate under the circumstances of this case and the point as presented was properly refused. Where a point for charge contains good law and bad law a Court is not bound to remold the point and separating the good from the bad, the wheat from the chaff, affirm that portion of the point which is an accurate statement of the law. Commonwealth v. Wilcox, 316 Pa. 129, 173 A. 653; Commonwealth v. Girardot, 107 Pa. Super. 274, 163 A. 362. If defendant had presented a point: "If you find the written statement of defendant was coerced in any way, then you must reject it entirely in your consideration of the case"—that would have been an accurate statement of the law, and would have had to be affirmed by the trial Judge unless he had already adequately covered it in his charge to the jury. Commonwealth v. Simmons, 361 Pa. 391, 401, 65 A. 2d 353; Turner v. Pennsylvania, 338 U. S. 62, 69 S. Ct. 1352, 93 L. Ed. 1810; Commonwealth v. Johnson, 365 Pa. 303, 74 A. 2d 144. But it is not the law that if the jury finds the written statement of the defendant or some parts of it was untruthful it must reject it entirely.

In Commonwealth v. Donough, 377 Pa. 46, at page 50, 103 A. 2d 694, 697, we said: "In Commonwealth v. Homeyer, 373 Pa. 150, at page 153, 94 A. 2d 743, at page 745, where the defense was suicide, the Court said: 'Defendant, like most defendants, proceeds on the assumption that you must believe all [or none] of his statements or confessions; of course, that is erroneous; a jury can believe all or a part of or none of a defendant's statements, confessions or testimony.' "

The next error alleged is the Court's refusal of the following point for charge:

"*No class of testimony is more uncertain and less to be relied upon than that as to identity* and, where great doubt is cast upon it by witnesses themselves, it is submitted to the jury with great caution, and if such testimony creates in your mind a reasonable doubt as to the identity of the defendant, your verdict must be not guilty."

[10] The question of identity was fairly and adequately covered in the Court's charge, which consumed two pages on this point. The Court called the jury's attention to the failure of the president and bookkeeper of the dress company to identify defendants on two prior occasions in contrast with their positive identification of defendants at the trial, and told the jury that there can be mistakes made insofar as identification testimony is concerned, and that the jury must accept such testimony with caution. We might dismiss defendants' objection on this point by the following quotation from Commonwealth v. Smith, 374 Pa. 220, 236, 97 A. 2d 25, 34. "All of the points set out in these requests had been elaborately considered by the court in its general charge and there was no error in its refusal to repeat them. Com. v. Weston, 297 Pa. 382, 147 A. 79; Com. v. Zietz, 364 Pa. 294, 298, 72 A. 2d 282." But we think in fairness to the defendants as well as to the Bench and Bar, we should specifically rule on this point (a) because *the italicized part of it* is an exact quotation from Commonwealth v. House,[2] 223 Pa. 487, 72 A. 804, and Commonwealth v. Sharpe, 138 Pa. Super. 156, 10 A. 2d 120, and (b) because loose and different statements have been made on the subject of identity. We believe such a generalization is too broad a statement of the general principle or rule of law on this subject and a trial Judge should not so charge the jury.

[11] Where the opportunity for positive identification is good and the witness is positive in his identification and his identification is not weakened by prior failure to identify, but remains, even after cross-examination, positive and unqualified, the testimony as to identification need not be received with caution—indeed the cases say that " 'his [positive] testimony as to identity may be treated as the state-

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[2] This quotation from Commonwealth v. House has never been repeated by this Court, although it has been reiterated by the Superior Court.

ment of a fact' ". Commonwealth v. Ricci, 161 Pa. Super. 193, 195, 54 A. 2d 51, 52, Commonwealth v. Sharpe, 138 Pa. Super. 156, 159, 10 A. 2d 120. For example, a positive, unqualified identification of defendant by one witness is sufficient for conviction even though half a dozen witnesses testify to an alibi. Commonwealth v. Pride, 143 Pa. Super. 165, 167, 18 A. 2d 879; Commonwealth v. Saldutte, 136 Pa. Super. 52, 56, 7 A. 2d 121; Commonwealth v. Ricci, 161 Pa. Super. 193, 54 A. 2d 51, supra; Commonwealth v. Tracey, 130 Pa. Super. 15, 196 A. 549; Commonwealth v. Lindner, 133 Pa. Super. 196, 2 A. 2d 518; Commonwealth v. Sharpe, 138 Pa. Super. 156, 10 A. 2d 120, supra.

[12] On the other hand, where the witness is not in a position to clearly observe the assailant, or he is not positive as to identity, or his positive statements as to identity are weakened by qualification or by failure to identify defendant on one or more prior occasions, the accuracy of the identification is so doubtful that the Court should warn the jury that the testimony as to identity must be received with caution.

[13] In Commonwealth v. Reid, 123 Pa. Super. 459, 466, 187 A. 263, 266, the Superior Court correctly said: " '* * * Identification may be made through the perception of any of the senses, and it is not essential that the witness should himself be free from doubt as to the correctness of his opinion. * * *' Wharton's Criminal Evidence, vol. 2, p. 1776, §1015. 'Proof beyond a reasonable doubt, or (of) the identity of the accused as the person who committed the crime, is essential to a conviction. The evidence of identification, however, need not be positive and certain [in order to convict]. A witness may testify that it is his belief, opinion, or judgment that the accused is the person who committed the crime. The indefiniteness and uncertainty in the testimony, of course, affects its weight.' Wharton's

Criminal Evidence, vol. 2, p. 1626, §932. See Com. v. Roddy, 184 Pa. 274, 39 A. 211."

[14] It is well to recall that proof of identity by eyewitness is not necessary—a defendant may be and often has been convicted where the evidence is entirely circumstantial and there is no evidence of identity. See Commonwealth v. Lowry (driver of a getaway car), 374 Pa. 594, 600, 98 A. 2d 733; Commonwealth v. Homeyer, 373 Pa. 150, 94 A. 2d 743; Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070; Commonwealth v. Wentzel, 360 Pa. 137, 61 A. 2d 309.

[15] It follows that a weak identification,[3] together with other evidence in the case, may be sufficient to convince a jury of the defendant's guilt beyond a reasonable doubt—the credibility of the witnesses and the weight to be given their identification is, under proper instructions from the Court, exclusively for the jury. See Commonwealth v. Ronello, 242 Pa. 381, 89 A. 553; Commonwealth v. Sharpe, 138 Pa. Super. 156, 10 A. 2d 120, supra; Commonwealth v. Ronello, 251 Pa. 329, 96 A. 826.

[16] William Kloiber contends that the evidence against him being circumstantial the Commonwealth must prove facts and circumstances of such a character as to prove his guilt *to a moral certainty*. Of course it is clearly settled that a man may be convicted on circumstantial evidence alone, provided his guilt is proved beyond a reasonable doubt. Commonwealth v. Lowry, 374 Pa. 594, 98 A. 2d 733, supra; Commonwealth v. Homeyer, 373 Pa. 150, 94 A. 2d 743, supra; Commonwealth v. Danz, 211 Pa. 507, 60 A. 1070, supra; Commonwealth v. Wentzel, 360 Pa. 137, 61 A. 2d 309, supra.

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[3] How far the Courts have gone in admitting weak or qualified or contradictory evidence of identity is apparent from Commonwealth v. Ronello, 251 Pa. 329, 96 A. 826; Commonwealth v. Fink, 93 Pa. Super. 57.

However, there are a number of cases which say that "in order to warrant a conviction [on circumstantial evidence] the facts and circumstances proved must be of such character as to produce a moral certainty of the guilt of the accused beyond any reasonable doubt—". Commonwealth v. Libonati, 346 Pa. 504, 31 A. 2d 95, 97; Commonwealth v. Linkowski, 363 Pa. 420, 423, 70 A. 2d 278; Commonwealth v. Wentzel, 360 Pa. 137, 61 A. 2d 309, supra. The inclusion of the words "moral certainty" has been severely criticized by Wigmore, Trickett and by our own Court.[4]

[17] In Commonwealth v. Bausewine, 354 Pa. 35, at page 41, 46 A. 2d 491, 493. Mr. Justice, later Chief Justice Drew, said: "* * * The facts and circumstances proved must, in order to warrant a conviction, be such as to establish the guilt of the defendant, *not necessarily beyond a moral certainty,* nor as being absolutely incompatible with his innocence, but at least beyond a reasonable doubt. The circumstantial evidence in this case is not such 'as reasonably and naturally to justify an inference of the guilt of the accused, and * * * of such volume and quality as to overcome the presumption of innocence and satisfy the jury of the accused's guilt beyond a reasonable doubt.' Commonwealth v. Marino, 142 Pa. Super. 327, 16 A. 2d 314, 317; Commonwealth v. Libonati, 346 Pa. 504, 508, 31 A. 2d 95; Commonwealth v. Holt, 350 Pa. 375, 387, 39 A. 2d 372. * * *"

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[4] 9 Wigmore (3rd Ed. 1940), §2497, pp. 316-320 (Measure of jury's persuasion; proof beyond a reasonable doubt; rule for criminal cases). Chief Justice May: "Some Rules of Evidence: Reasonable Doubt in Civil and Criminal Cases" (American Law Rev., X, 642). Dean Trickett: "Preponderance of Evidence, and Reasonable Doubt" (The Forum, Dickinson School of Law, X, 76). Both articles quoted in Wigmore, op. cit., pp. 320-324; Hopt v. Utah, 120 U. S. 430, 440, 7 S. Ct. 614, 30 L. Ed. 708; Commonwealth v. Wentzel, 360 Pa. 137, 61 A. 2d 309, supra, dissenting opinion by Chief Justice Maxey, 360 Pa. at page 153, 61 A. 2d 315; Commonwealth v. Bausewine, 354 Pa. 35, 46 A. 2d 491, supra; State v. Koski, 100 W. Va. 98, 130 S. E. 100, 101. Cf. Commonwealth v. Holt, 350 Pa. 375, 387, 39 A. 2d 372.

We are of the opinion that the use of the words "moral certainty" serves to confuse and befog the jury instead of enlightening and aiding them in determining whether the Commonwealth has convinced them of the guilt of the defendant beyond a reasonable doubt,[5] and that in the future it would be wiser if the charge did not contain any reference to "moral certainty". In the instant case defendants' objections are without merit because the trial Judge charged the jury more favorably to the defendants than was necessary.

[18] We agree with the lower Court that the testimony was amply sufficient to prove the guilt of both defendants. We have considered all the other contentions of the defendants but deem further discussion unnecessary.

JUDGMENT OF THE SUPREME COURT OF PENNSYLVANIA.

The judgments entered in the Court below which were affirmed by the Superior Court and the Order of the Superior Court are all affirmed.

MUSMANNO, J., filed an opinion concurring and dissenting in part.

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[5] "Reasonable doubt" has been recently defined in Commonwealth v. Donough, 377 Pa. 46, 51-52, 103 A. 2d 694.

DISSENTING OPINION.

MUSMANNO, Justice (concurring and dissenting in part).

I concur in the Majority Opinion but I can be something less than enthusiastic about its citing with approval the quotation from Commonwealth v. Bausewine, 354 Pa. 35, 46 A. 2d 491, 493, in which Justice Drew (later Chief Justice) said: "The facts and circumstances proved must, in order to warrant a conviction, be such as to establish the guilt of the defendant, not necessarily beyond a moral certainty, nor as being absolutely incompatible with his innocence, but at least beyond a reasonable doubt." In fact, I do not agree at all with the statement made by Chief Justice Drew that a conviction is proper even though the evidence is not absolutely incompatible with innocence.

What happens to the time-honored rule that all doubts are to be resolved in favor of the accused if a jury allowed to return a verdict of guilty when it is not morally certain of the defendant's guilt and the evidence is not incompatible with innocence? Although a juror can with a good conscience return a verdict of guilty where he is convinced of the defendant's guilt beyond a reasonable doubt that does not amount to mathematical certitude, I doubt that he can sleep easily of nights if by his vote he sends a defendant to prison or to his death when he entertains a moral incertainty as to his guilt.

This Court has often said the following:

> "When a charge of crime is sought to be sustained by circumstantial evidence, the hypothesis of guilt should flow from the facts and circumstances proved, and be consistent with them all. The evidence must be *such as to exclude to a moral certainty every hypothesis but that of guilt of the offense imputed;* the facts and cir-

cumstances must not only be consistent with and point to the guilt of the accused, *but they must be inconsistent with his innocence.*"[1] (Emphasis supplied.)

If this Court is parting company with this rule I am sorry to see it go. I would retain it.

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[1] Commonwealth v. Holt, 350 Pa. 375, 397, 39 A. 2d 372; Commonwealth v. Bardolph, 326 Pa. 513, 521, 192 A. 916; Commonwealth v. Benz, 318 Pa. 465, 472, 178 A. 390.